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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS

The appellees respectfully move the Court to dismiss this appeal on the ground that certain facts, which have occurred since the entry of the order in the court below, render this appeal moot.

The appellants seek a determination by this Court of the following questions:

> (1) Whether the district court which had refused to require immediate reapportionment of the Georgia General Assembly, exceeded its equitable powers in enjoining the submission by a malapportioned legislature of an entirely new state constitution for ratification at the November 3, 1964 general election.
>
> (2) Whether the district court exceeded its equitable powers in purporting to restrict the powers of the 1965 General Assembly during the interim prior to reapportionment.

These questions have been rendered moot as the result of events which have transpired since the entry of the order of June 30, 1964, from which this appeal is taken.

By this appeal the appellants sought the right to submit the proposed revision of the Georgia Constitution for ratification by the electorate at the November 3, 1964 general election. It is apparent that any controversy as to the propriety of the injunction which prohibited the placing of the proposed constitution on the November 1964 general election ballot has been rendered moot by that election. *Mills* v. *Green*, 159 U.S. 651, 16 Sup.Ct. 132, 40 L.Ed. 293 (1895). Even if this Court should decide the case in favor of the appellants, it is now powerless to grant them any effective relief. As this Court has aptly said in another context:

> "Obviously no decision we could render now would protect any rights [they] may once have had, and this Court does not sit to decide arguments after events have put them to rest." *Doremus* v. *Board of Education*, 342 U.S. 429, 432-33, 72 Sup. Ct. 394, 96 L.Ed. 475 (1952).

In *Mills* v. *Green*, 159 U.S. 651, 16 Sup.Ct. 132, 40 L.Ed. 293 (1895), this Court emphasized its inability to grant effective relief after an election as requiring a dismissal of an action to enjoin South Carolina election officials from illegally refusing to permit a qualified voter from participating in a particular election. Said the Court:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect,

and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal . . .

". . . .

"In the case at bar, the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the circuit court of appeals dismissing this bill, that date had passed, and before the entry of the appeal in this court, the convention had assembled . . .

"It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the circuit court, no relief within the scope of the bill could now be granted."

Similarly, in *Blackman* v. *Stone*, 17 F.Supp. 102 (S.D. Ill. 1936), judgment vacated 300 U.S. 641, 57 Sup.Ct. 514, 81 L.Ed. 856 (1937) this Court likewise held an appeal to be moot under circumstances closely resembling those in the present case. There qualified Illinois

voters sought to compel the inclusion of certain candidates on the general election ballot of November, 1936. After the election, this Court held the case to be moot and directed that the judgment of the lower court, denying relief, be vacated. These and other decisions of this Court require a dismissal of this appeal after the election. See e.g. *Jones* v. *Montague*, 194 U.S. 147, 24 Sup.Ct. 611, 48 L.Ed. 913 (1904); *Richardson* v. *McChesney*, 218 U.S. 487, 31 Sup.Ct. 43, 54 L.Ed. 1121 (1910); *Love* v. *Griffith*, 266 U.S. 32, 45 Sup.Ct. 12, 69 L.Ed. 157 (1924); *Local No. 8-6, Oil, Chemical and Atomic Workers International Union* v. *Missouri*, 361 U.S. 363, 80 Sup.Ct. 391, 4 L.Ed.2d 373 (1960).

The issues presented are not rendered less abstract by the fact that the injunction also purported to prohibit the proposed constitution from being placed on the ballot at "any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards . . ." (R.200-201). Unlike the Georgia county unit case, *Gray* v. *Sanders*, 372 U.S. 368, 83 Sup.Ct. 801, 9 L.Ed.2d 821 (1963), there is here no statute which constitutes a continuing threat to the constitutional rights of the appellees. Under the amendatory provisions of the Georgia constitution, a constitutional amendment proposed by the General Assembly must be "submitted to the people of the entire State at the *next* general election at which members of the General Assembly are elected." Ga. Const. of 1945, Art. XIII, Section 1, Paragraph 1 (Ga. Code Ann. § 2-8101). As the Supreme Court of Georgia has emphasized, the requirements of this section are mandatory and must be strictly observed. *Seago* v. *Richmond County*, 218 Ga. 151, 126 S.E.2d 657 (1962). In compliance with the requirements of this section, the proposed new state constitution expressly pro-

vided that it be "submitted to the people for ratification or rejection as one single amendment to the Constitution at the next General Election in November, 1964, as provided by law." Art. 9, Section 2, Ga. Laws May-June, 1964 Extraordinary Session 234, at 333.

Before the proposed new constitution can be placed on the ballot for ratification in any future general election, it must again be submitted to the General Assembly and passed by an affirmative two-thirds vote of both houses. Ga. Const. of 1945 Art. XIII, Section 1, Paragraph 1 (Ga. Code Ann. 82-8101). This Court has repeatedly admonished that "constitutional questions are not to be dealt with abstractly." *Local No. 8-6, Oil, Chemical and Atomic Workers International Union* v. *Missouri*, 361 U.S. 363, 370, 80 Sup.Ct. 391, 4 L.Ed.2d 373 (1960). The mere possibility that a similar constitutional proposal may be passed by the General Assembly at some future time is an insufficient basis for invoking the awesome responsibility of constitutional adjudication by this Court. cf. *Poe* v. *Ullman*, 367 U.S. 497, 81 Sup.Ct. 1752, 6 L.Ed.2d 989 (1961); *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 40 Sup.Ct. 448, 64 L.Ed. 808 (1920). Without further legislative action, this appeal presents only an abstract, hypothetical controversy in which the "lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity" is lacking. *Poe* v. *Ullman*, 367 U.S. 497, 503, 81 Sup.Ct. 1752, 6 L.Ed.2d 989 (1961). Thus, it is clear any question presented by this appeal as to the power of a grossly malapportioned legislature to fundamentally alter the charter of state government by proposing to the electorate an entirely new state constitution is moot. Insofar as the order of June 30, 1964, purports to prohibit the submission of the proposed constitution,

it should now be vacated. *United States* v. *Munsingwear*, 340 U.S. 36, 71 Sup.Ct. 104, 95 L.Ed. 36 (1950). The remaining portions of the order of June 30, 1964 from which no appeal has been taken would, of course, not be affected thereby.[1]

The remaining question as to the existence of any limitations upon the power of the General Assembly during the 1965 term is also moot. On October 7, 1964, the appellants moved in the district court for a modification of the order of June 30, 1964, to eliminate those portions of paragraph 3 which they found objectionable.[2] Although the appellees had never interpreted the order of June 30, 1964 as limiting the powers of the General Assembly, they filed a response consenting to a modification of paragraph 3 of the order. On November 3, 1964,

---

[1] No appeal was taken by the appellants from the decision of the district court holding the present apportionment of the Georgia House to be unconstitutional nor was an appeal taken from that portion of the order of June 30, 1964 which restricted the terms of all legislators elected under the unconstitutional apportionment of the November 3, 1964 general election to one year. Similar limitations upon the length of legislative terms have been imposed by other courts as an appropriate exercise of equitable powers to insure prompt reapportionment. See order of September 28, 1964 in *Davis* v. *Mann*, in which the four-year terms for which members of the Virginia Senate were elected in November 1963 were ordered terminated in January of 1966, a year earlier than their normal expiration date. A stay of the order was denied by the Chief Justice on October 28, 1964; order of July 27, 1964 in *W.M.C.A. Inc.* v. *Simon*, in which the terms of members of the New York Legislature were limited to one year. An appeal from this decision is now pending before this Court. (Nos. 611, 623).

[2] For the convenience of the Court, the order of the district court of November 3, 1964, together with the appellants' motion and the appellees' response thereto, are printed as appendices to this motion.

the motion of the appellants was granted by the district court which eliminated from its former order any language which might be construed as restricting the powers of the General Assembly during its 1965 term.[3] Therefore, any question as to the validity of any limitations which may have been thought to exist under the prior order is now moot.

---

[3] The district court denied the appellants' motion to permit the members of the General Assembly to serve full two-year terms without reapportionment. Since no appeal was taken from that portion of the order of June 30, 1964, which restricted the terms of all legislators elected in the November 3, 1964 general election, no question as to the validity of this limitation is presented for determination by this Court. Since, under *Reynolds* v. *Sims*, 371 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed.2d 506 (1964), the district court was authorized "to insure that no further elections are conducted under the invalid plan," the power of the district court in the exercise of its equitable discretion, to adopt a less drastic remedy, by reducing the length of the terms which legislators would be permitted to serve prior to reapportionment cannot be seriously questioned. Similar limitations have been imposed in Virginia and New York. See footnote 1, *supra*.

CONCLUSION

It is apparent that the questions of which the appellants seek a determination by this appeal have been rendered moot by the November 3, 1964 general election and by the order of the district court of November 3, 1964. Therefore, the appellees respectfully ask that their motion to dismiss this appeal be granted.

Francis Shackelford
Attorney for Appellees

Edward S. White
Israel Katz
Joseph B. Cumming
Hamilton Lokey
William B. Gunter
A. R. Kenyon

Emmet J. Bondurant, II
J. Quentin Davidson
John E. Simpson
Raymond M. Reed
John W. Sognier
Albert P. Reichert

1220 Citizens &
Southern National
Bank Building
Atlanta, Ga. 30303

PROOF OF SERVICE

I, Emmet J. Bondurant, II, attorney for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1964, I served copies of the foregoing Motion on the appellants herein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellants.

Emmet J. Bondurant, II

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HENRY J. TOOMBS, ET AL.,
PLAINTIFFS,
v.
BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.,
DEFENDANTS.

CIVIL ACTION
No. 7883

MOTION FOR MODIFICATION OF ORDER

Come now defendants, and move the Court for a modification of its order dated June 30, 1964, and by way of grounds thereof, show as follows:

1.

That paragraph 3 of said order provides as follows:

"(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965

45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966."

2.

That the effect of the aforesaid paragraph is threefold, to wit:

(a) Said paragraph delimits the authority of the General Assembly elected in the 1964 November General Election, and which takes office in January, 1965, as to subject matters which it may consider and the authority which it may exercise, in that said paragraph prohibits the House of Representatives, and consequently the entire General Assembly, from performing any duties except "the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session . . ." This limitation effectively precludes said General Assembly from voting bills of impeachment (Constitution, Art. III, Sec. VI, Par. III); conducting investigations; hearing election contests (Id., Sec. VII, Par. I, and cf *Beatty* v. *Myrick*, 218 Ga. 629); electing or removing a state auditor (Code § 40-1801); granting pardons or other relief for persons convicted of treason (Constitution, Art. V, Sec. I, Par. XI); and likewise pro-

hibits said General Assembly from giving consideration to constitutional amendments which are separate as to subject matter (see *11 Am. Jur. 632*, § 28), one or more of which properly are required in connection with a full compliance with other paragraphs of said order requiring reapportionment of the House of Representatives.

(b) Said paragraph limits the service of the General Assembly to service during the regular 45-day session, which precludes the calling of any special sessions should the necessity therefor arise; prohibits any interim committees of the House from functioning; and renders of doubtful legality the expenditure of state funds for operation of the offices of the Speaker, Floor Leader, Clerk and other officials of the House after the 45-day session adjourns.

(c) Said paragraph, in requiring that a reapportioned House of Representatives take office not later than the second Monday in January, 1966, necessarily requires that an election be held during 1965 for the House of Representatives, contrary to the Constitution of Georgia, Article III, Section IV, Paragraph I, (Code § 2-1602), requiring that such elections be held biennially; in even numbered years, thereby raising serious question and doubt as to the legality under the state constitution for any such election to be held during 1965.

3.

Insofar as said paragraph of said order requires that a reapportioned House of Representatives take office in January, 1966, said order in effect thereby requires that members of the House of Representatives vote legislation

to abolish their own terms of office during the middle thereof.

4.

Defendants show that more meaningful reapportionment legislation could be adopted in 1965, and with less difficulty, if the members of the House of Representatives then in session could be permitted to serve out the remainder of their respective terms as heretofore provided by law, and a reconstituted House of Representatives take office in January, 1967, reapportioned in accordance with constitutional requirements.

5.

That because of the foregoing reasons, the order of this Court dated June 30, 1964, should be amended and modified by striking paragraph 3 thereof, and by substituting in lieu thereof, the following:

> "(3) The motion of plaintiffs for further injunctive relief prior to the 1964 November General Election is hereby denied, without prejudice to the right of plaintiffs to reapply to this court for further relief should the General Assembly, which convenes in January, 1965, fail to enact such legislation and constitutional amendments, if any, as may be necessary for a reconstituted House of Representatives to take office not later than the 1967 session, reapportioned in accordance with constitutional requirements."

6.

That in the alternative, and should the Court decline to grant the relief above referred to, the said order of this Court should be amended and modified by striking said paragraph 3 thereof, and by substituting in lieu thereof, the following:

> "(3) The motion of plaintiffs for further injunctive relief prior to the 1964 November General Election is hereby denied, without prejudice to the right of the plaintiffs to reapply to this court for further relief should the General Assembly which convenes in January, 1965, fail to enact such legislation as may be necessary for a reconstituted House of Representatives to take office at the beginning of the session which convenes in January, 1966, reapportioned in accordance with constitutional requirements. To the extent that state statutory and constitutional provisions otherwise might conflict therewith, they are hereby declared to be ineffectual."

7.

That insofar as concerns the granting of the relief referred to in paragraph 6 above, plaintiffs do not object thereto, for in Motion to Affrm filed on their behalf in the Supreme Court of the United States on the appeal by defendants from this Court's order of June 30, 1964, plaintiffs declare:

> "If appellants should see fit to apply to the district court for modification of the order to eliminate

such limitations on the authority of the 1965 General Assembly, appellees will offer no objection to such modification as is necessary to eliminate the restrictions as to which appellants complain in that portion of their jurisdictional statement."

Wherefore, defendants pray:

(1) That a rule nisi issue.

(2) That the order of this court dated June 30, 1964, be modified as set forth in Paragraph 5 hereof, or in the alternative, if such prayer is denied, that said order be modified as set forth in paragraph 6 hereof.

40 Capitol Square
Atlanta, Georgia

EUGENE COOK
The Attorney General

Elberton, Georgia

E. FREEMAN LEVERETT
Deputy Assistant
Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

HENRY J. TOOMBS, ET AL., PLAINTIFFS,

v.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL., DEFENDANTS.

CIVIL ACTION No. 7883

RESPONSE OF PLAINTIFFS TO PROPOSED MODIFICATION OF ORDER OF JUNE 30, 1964

In response to this Court's direction of October 29, 1964, the plaintiffs respectfully file this response with respect to the proposed modification of paragraph (3) of the order of June 30, 1964:

1. As the plaintiffs stated in their Brief in Opposition to Defendants' Motion for Stay Pending Appeal, pages 12-13, and their Motion to Affirm, pages 19-20, which were filed in the Supreme Court of the United States in connection with the appeal of the above case, the plaintiffs never interpreted the order of June 30, 1964 as prohibiting the 1965 General Assembly from performing the duties and functions asserted by the defendants in paragraph 2 of their Motion filed before this Court. However, the plaintiffs continue to be, as they have been in the past, fully desirous of cooperating with the defendants in order that reapportionment of the General Assembly in conformity with the requirements of the Fourteenth Amendment can be expeditiously accom-

plished without undue interference with or limitations upon its powers during the interim period prior to such reapportionment.

2. To this end the plaintiffs are in full accord with and hereby consent to a modification of paragraph (3) of the order of June 30, 1964 in conformity with the tentative draft of October 29, 1964.

Respectfully submitted,

Francis Shackelford
Attorney for Plaintiffs

Edward S. White	Joseph B. Cumming
Israel Katz	J. Quentin Davidson
Emmet J. Bondurant, II	John E. Simpson
Hamilton Lokey	Raymond M. Reed
William B. Gunter	John W. Sognier
A. R. Kenyon	Albert P. Reichert

PROOF OF SERVICE

I, Emmet J. Bondurant, attorney for plaintiff herein, hereby certify that on the 30th day of October, 1964, I served copies of the foregoing Response on the defendants therein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, and E. Freeman Leverett, Assistant Attorney General, 25 Thomas Street, Elberton, Georgia, attorneys of record for said defendants.

Emmet J. Bondurant

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HENRY J. TOOMBS, ET AL.,
PLAINTIFFS,
v.
BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.,
DEFENDANTS.

CIVIL ACTION
No. 7883

The defendants filed a motion on October 7, 1964, seeking a modification of the order of this Court entered June 30, 1964. The motion sought a change that would remove the requirement that the General Assembly of the State of Georgia pass such legislation as required to effect a valid apportionment of the seats in the House of Representatives during the 1965 session, and sought a change that would permit the term of the members of the House of Representatives to extend through the calendar year 1966. In the alternative, the motion sought a clarification of the provisions of paragraph 3 of the said order of June 30, 1964, to make it clear that such members would remain duly qualified to perform all the duties of the office except as specifically limited in the order.

It appearing that this Court's order was entered sufficiently in advance of the date of this year's elections

to permit each candidate to become thoroughly familiar with limitations of the terms of service, and it further appearing that ample time was provided for the General Assembly, either at a special session this year or at the 1965 regular session, to enact proper apportionment legislation prior to January, 1966, the motion to change the order by extending the term through the year 1966 is hereby DENIED.

Both parties agree that the motion for alternative relief should be granted. Therefore, paragraph 3 of the order of June 30, 1964, is hereby stricken and the following paragraph 3 is substituted in lieu thereof:

> "(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that, notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to a term of one year's duration and provided further that the plaintiffs shall have the right to reapply to this Court for further relief should the General Assembly, which convenes in January, 1965, fail to enact, during the regular 1965 45-day session, as provided in the Georgia Constitution, such legislation as may be necessary for the General Assembly to be reapportioned in accordance with Constitutional requirements and as may be necessary to permit

the holding of elections to the newly constituted General Assembly during the calendar year 1965, which elections are to be held at such time as may be necessary to permit the members of such newly constituted General Assembly to take office no later than the second Monday in January, 1966. To the extent that state statutory and constitutional provisions might otherwise conflict with such legislative reapportionment, they are hereby declared to be void and of no effect."

This 3rd day of November, 1964.

Elbert P. Tuttle
United States Circuit Judge

Griffin B. Bell
United States Circuit Judge

Lewis R. Morgan
United States District Judge